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**Subject:** Microsoft Settlement

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I strongly oppose the Justice Department's proposed settlement of the Microsoft antitrust case for the following reasons:

### **Five Fundamental Flaws in the PFJ:**

**1. The PFJ does not End Microsoft's Monopoly and Even Allows Microsoft to expand its Monopoly into Other Technology Markets.** The deal fails to terminate the Microsoft monopoly, and instead guarantees Microsoft's monopoly will survive and be allowed to expand into new markets. Microsoft has always found it advantageous to leverage its operating system monopoly position in order to maximize its own profits, which many of us have experienced firsthand.

In other words, to maximize profits (the goal of every public company), monopolists are almost forced to maximize the market power that their monopoly gives them. And this is why ALL monopolies must be carefully watched to make sure they don't abuse their monopoly position. Indeed, many monopolies are either broken up or carefully regulated in order to protect the public interest. Why is Microsoft allowed a waiver to this general rule? Does the Justice Department think that Microsoft is going to suddenly change its operating methodology? The proposed deal with the justice department does not address the fact that Microsoft has abused its monopoly and is likely to do so again, and again, and again in the future to the detriment of others.

### **2. The PFJ Does Not Adequately Address Anticompetitive Behavior Identified by the Appeals Court.**

A. Retaliation. The proposed settlement does not address Microsoft's proven ability to retaliate against would-be competitors and to, in effect, appropriate the intellectual property of its competitors and even its partners in fact all who do business with Microsoft. The Appeals court found such past conduct by Microsoft highly egregious yet the Agreement does not address these issues. Again, many of us have been on the receiving end of these types of Microsoft bullying tactics.

B. Bolting. The PFJ does not address the issue that fueled consumer criticism and which gave rise to this antitrust case in 1998: Microsoft's decision to bind or "bolt" Internet Explorer to the Windows operating system in order to crush its browser competitor Netscape. This settlement gives Microsoft sole discretion to unilaterally determine that other products or services which don't have anything to do with operating a computer are nevertheless part of a Windows Operating System product. This creates a new exemption from parts of antitrust law for Microsoft and would leave Microsoft free in future versions to bolt financial services, cable television, or the Internet itself into Windows.

C. Java. The Court of Appeals affirmed that Microsoft had unlawfully and intentionally deceived Java developers and "polluted" the Java standard in order to protect its monopoly and defeat competition. Yet, the proposed settlement does not restrict Microsoft's ability to modify, alter or refuse to support computer industry standards, including Java, or to engage in campaigns to deceive developers of rival platforms, middleware or applications software. Indeed, Microsoft's decision not to distribute Java technologies with Windows XP, which hurts developers and consumers alike, will be the shape of things to come under the proposed deal unless the Court requires Microsoft to continue to distribute Java technologies.

### **3. The PFJ Incorporates Such Large Loopholes to Its Enforcement Provisions as to Render Enforcement Meaningless.**

A. Middleware. As part of the PFJ, Microsoft is required to allow the PC manufacturers to hide Microsoft middleware programs and allow them to install icons or links to competing middleware programs. The only problem is that the PC manufacturers are not allowed to remove the code that could be used to reactivate Microsoft's middleware programs. In other words, two weeks into owning the machine, a consumer could be asked if they want to reconfigure their desktop, install all the Microsoft middleware and delete all the competitor's middleware, which many users would undoubtedly do.

B. Communication Protocols. The PFJ states that Microsoft must now share information on how its middleware and server software work together with Windows. However, Microsoft does not have to disclose this information for middleware it does not distribute separate from windows, or for middleware it has not trademarked. This again is the huge loophole of "Bolting" that was discussed above. If Microsoft wants to drive a competitor out of business, they just attach the specific type of software the competitor is involved with to their Windows platform. Once they do that, they do not have to share the API's and other basic information that is needed by the competitor to ensure its software works with Windows. And without reliable access to 90% of the PCs in the world no competitor can survive. Once the competitor is out of business, Microsoft can separate the software from the Windows package, sell it separately and derive huge margins. In addition, Microsoft does not have to disclose their information to companies that in their view do not have a "viable business" (defined as selling at least 1 million units in the previous year).

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This loophole will allow Microsoft to hamper new software startups from becoming true competitors simply if in Microsoft's view they are not a "viable business". Who can really say which new startup is a "viable business"? Certainly this should not be left to the judgment of a voracious monopolist.

Lastly, Microsoft does not have to disclose this coding information if Microsoft deems such disclosure would harm the company's security or software licensing. There is no provision to say who is to make this determination, leaving it on a de facto basis up to Microsoft.

C. Bribing Competitors. The PFJ states that Microsoft "shall not enter into any agreement to pay a software vendor not to develop or distribute software that would compete with Microsoft's products. However, another provision in the Agreement permits those payments and deals when they are "reasonably necessary." Who is the ultimate arbiter of when these deals would be "reasonably necessary"? The Agreement does not specify so Microsoft may well be allowed to make that decision.

#### **4. The PFJ Does Not Provide an effective Enforcement Mechanism for the Weak Restrictions it does Implement.**

The proposed settlement requires a three-man compliance team to oversee Microsoft's compliance with the Agreement. Microsoft will appoint one person, the Justice Department another, and the third will be chosen by the two people already appointed. In essence, Microsoft will control half the team. This new team will not be allowed to inform the public of their work, and cannot impose fines. In addition, the work of the committee cannot be admitted into court in any enforcement proceeding. The committee's sole remedy for infractions is for them to inform the Justice Department of the infraction and then the Justice Department will have to conduct their own research and commence litigation to stop the infraction. The Justice Department does not need a compliance group to tell them when Microsoft is doing something wrong, so in reality this group is just a smoke screen.

#### **5. The PFJ Does not deny to Microsoft the Fruits of its Past Statutory Violations.**

Under the proposed settlement, Microsoft is only marginally penalized for its anticompetitive misdeeds. Every court involved with this case has acknowledged that Microsoft broke the antitrust laws, yet under the terms of the proposed Agreement, Microsoft would be allowed to retain almost all of the profits gained from these activities.

Nor does the PFJ make an accounting of all the gains Microsoft made through its illegal activities, nor does it try and compensate those harmed by Microsoft's misdeeds. Through this proposed settlement, the Justice Department is sending a very clear (and very dangerous) message that anticompetitive behavior is totally acceptable. Every large potential monopolist is being told that they can get away with this sort of illegal behavior without fear of losing any of the profits made from such conduct. There is every incentive for future monopolists (most definitely including Microsoft) to engage in this type of predatory conduct and no incentive not to.

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